

1 E. MARTIN ESTRADA  
United States Attorney  
2 MACK E. JENKINS  
Assistant United States Attorney  
3 Chief, Criminal Division  
KEVIN J. BUTLER (Cal. Bar No. 329129)  
4 Assistant United States Attorney  
Violent & Organized Crimes Section  
5 ALI MOGHADDAS (Cal. Bar No. 305654)  
Assistant United States Attorney  
6 Major Frauds Section  
1300/1100 United States Courthouse  
7 312 North Spring Street  
Los Angeles, California 90012  
8 Telephone: (213) 894-2400  
Facsimile: (213) 894-0142  
9 E-mail: kevin.butler@usdoj.gov  
ali.moghaddas@usdoj.gov

10 Attorneys for Plaintiff  
11 UNITED STATES OF AMERICA

12 UNITED STATES DISTRICT COURT

13 FOR THE CENTRAL DISTRICT OF CALIFORNIA

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 v.

17 FEMI FELIX-UKWU, and  
18 MONIQUE FERGUSON,

19 Defendants.

No. 18-CR-529-MWF (A)

GOVERNMENT'S TRIAL MEMORANDUM

Trial Date: March 28, 2023

20  
21 Plaintiff United States of America, by and through its counsel  
22 of record, the United States Attorney for the Central District of  
23 California and Assistant United States Attorneys Kevin J. Butler and  
24 Ali Moghaddas, hereby submits its Trial Memorandum.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. STATEMENT OF CHARGES**

3 Defendants Femi Felix-Ukwu and Monique Ferguson are charged  
4 with, inter alia, conspiracy to commit wire fraud, in violation of 18  
5 U.S.C. § 1349, and conspiracy to possess, use, and transfer a means  
6 of identification, in violation of 18 U.S.C. § 1028(f). Defendant  
7 Ukwu is separately charged with unlawful possession, use, and  
8 transfer of a means of identification, in violation of 18 U.S.C.  
9 § 1028(a)(7), and aggravated identity theft, in violation of 18  
10 U.S.C. § 1028A(a)(1).

11 Jury trial is set for March 28, 2023 at 8:30 a.m. The  
12 government anticipates calling approximately ten witnesses in its  
13 case-in-chief, which it expects to last approximately two trial days.  
14 Depending on the defense case, the government anticipates a short  
15 rebuttal, which may include one to two witnesses.

16 **II. STATEMENT OF CASE**

17 **A. Defendants' Conspiracy to Book Non-Revenue Flights**

18 Beginning on a date unknown but at least as early as February  
19 2016, and continuing until a date unknown but at least as late as in  
20 or about November 2017, in Los Angeles County, within the Central  
21 District of California, and elsewhere, defendants knowingly combined,  
22 conspired, and agreed with others to commit wire fraud.  
23 Specifically, defendants and their co-conspirators sold or otherwise  
24 provided others stolen and unauthorized information pertaining to  
25 Mesa Airlines ("Mesa") flight crew, including their names, dates of  
26 hire, and employee identification numbers (the "Mesa employee  
27 information"), needed to book non-revenue crew tickets on Spirit  
28 Airlines ("Spirit"). A non-revenue crew ticket was a ticket for a

1 seat on a flight that an airline provided to other airline crew at no  
2 cost to the participating airline's crew member. Using the Mesa  
3 employee information as well as a verification code provided by  
4 defendants and their co-conspirators, more than 100 fraudulent  
5 travelers booked non-revenue crew tickets for Spirit flights through  
6 the web portal maintained by Spirit ("Spirit Web Portal"). In so  
7 doing, they misrepresented that they were employees of Mesa.

8 In furtherance of the conspiracy, defendants and their co-  
9 conspirators flew on Spirit flights using the non-revenue tickets  
10 booked through the Spirit Web Portal. To make these reservations,  
11 defendants used, without authorization, the identification number,  
12 date of hire, and verification code to Mesa employees T.T. and L.M.  
13 Specifically, defendant Ferguson flew at least twice using T.T.'s  
14 identifying information, and defendant Ukwu flew approximately 47  
15 times using L.M.'s identifying information.

16 **B. Defendants' Manufacture of ID's, and Participation in**  
17 **Conspiracy**

18 In approximately 2017, Spirit and Mesa airlines became aware of  
19 the foregoing fraudulent scheme to obtain non-revenue crew tickets  
20 for fraudulent travelers. Accordingly, in February 2017, Spirit  
21 implemented a policy requiring gate agents to check the purported  
22 Mesa crew member's employee badge before allowing the passenger to  
23 board. At this point, many of the fraudulent travelers, including  
24 witnesses who will testify at trial, recognized the fraudulent nature  
25 of this scheme and did not further travel using non-revenue crew  
26 tickets. However, notwithstanding this obvious red flag, defendants  
27 here chose to further their conspiracy by fraudulently manufacturing  
28 and selling fraudulent Mesa employee identification cards to board

1 flights. These identification cards purported to identify the  
2 fraudulent traveler as a Mesa employee, contained the employee  
3 identification number and date of hire of a true Mesa employee, and  
4 contained the name of the fraudulent traveler. In furtherance of  
5 this conspiracy, on or about February 21, 2017, after the Spirit  
6 policy change, co-defendant Hubbard Bell emailed defendant Ukwu a  
7 photo of his Mesa employee identification card. Thereafter,  
8 defendants conspired with one another to manufacture and produce at  
9 least six fraudulent Mesa employee identification cards, including  
10 one for each of the defendants. These employee identifications  
11 constitute counterfeit access devices.

12 As noted above, defendant Ukwu has been charged with additional  
13 counts, including unlawful possession, use, and transfer of a means  
14 of identification, and aggravated identity theft. The evidence at  
15 trial will show that defendant Ukwu not only manufactured the  
16 fraudulent Mesa employee identification cards, but he also produced  
17 one for himself, which he used to travel after the Spirit policy  
18 change. In doing so, defendant Ukwu, without authority or  
19 authorization, used a means of identification, specifically for a  
20 Mesa flight attendant, L.M. For such brazen conduct, defendant has  
21 been charged with the foregoing additional counts.

22 **C. Government's Witnesses and Time Estimates**

23 At trial, the government anticipates calling the following  
24 individuals (this list is subject to further modification both in  
25 additions and omissions, as well as changes to the parties' time  
26 estimates):

#	Gov't Witnesses	DX Est.	CX Est.
1	Kevin Funk	30	30
2	Mark Pietz	30	30
3	Ryan Heaton	30	30
4	Leon Spencer	15	15
5	Khalid Dadabhoy	10	10
6	Willie Harvey	10	10
7	Demetrius Walker	10	10
8	Nadia Deravine <sup>1</sup>	10	10
9	Latressa McVey	15	15
10	Torrey Theall	15	15
<b>Totals</b>		~ 3 hours	~ 3 hours

### III. ELEMENTS OF THE OFFENSES

#### A. Count One - Conspiracy to Commit Wire Fraud (Both Defendants)

Count One charges both defendants with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349. The elements are as follows: (1) beginning on a date unknown but at least as early as January 21, 2017 and continuing to in or around November 2017, there was an agreement between two or more persons to commit wire fraud; and (2) defendant became a member of the conspiracy knowing of its object and intending to help accomplish it.

The conspiracy involves an agreement to commit the substantive offense of wire fraud. The elements of wire fraud are as follows: (1) defendant knowingly participated in a scheme or plan to defraud,

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<sup>1</sup> As discussed at the pretrial conference, the parties agreed that Ms. Deravine, who is in the third trimester of her pregnancy, may testify via video teleconference.

1 or a scheme or plan for obtaining money or property by means of false  
2 or fraudulent pretenses, representations, or promises; (2) the  
3 statements made or facts omitted as part of the scheme were material;  
4 that is, they had a natural tendency to influence, or were capable of  
5 influencing, a person to part with money or property; (3) the  
6 defendant acted with the intent to defraud, that is, the intent to  
7 deceive or cheat; and (4) the defendant used, or caused to be used,  
8 an interstate wire communication to carry out or attempt to carry out  
9 an essential part of the scheme.

10 **B. Count Two - Conspiracy to Possess, Use, and Transfer a**  
11 **Means of Identification (Both Defendants)**

12 Count Two charges both defendants with conspiracy to possess,  
13 use, and transfer a means of identification, in violation of 18  
14 U.S.C. § 1028(f). The elements are as follows: (1) beginning on a  
15 date unknown but at least as early as January 21, 2017 and continuing  
16 to in or around November 2017, there was an agreement between two or  
17 more persons to commit possession, transfer, or use of another  
18 person's means of identification without lawful authority; and (2)  
19 defendant became a member of the conspiracy knowing of its object and  
20 intending to help accomplish it.

21 The conspiracy involves an agreement to commit the substantive  
22 offense of possessing, transferring, or using another person's means  
23 of identification without lawful authority. The elements of the  
24 substantive offense are as follows: (1) defendant knowingly  
25 transferred, possessed, or used a means of identification of another  
26 person; (2) defendant did so without lawful authority; (3) defendant  
27 transferred, possessed, or used the means of identification in  
28 connection with conspiracy to commit wire fraud, as charged in Count

1 One; and (4) the transfer, possession, or use of the means of  
2 identification of another person was in or affected commerce between  
3 one state and other state, or between a state of the United States  
4 and a foreign country.

5 **C. Count Four - Unlawful Possession, Use, and Transfer of a**  
6 **Means of Identification (Defendant Ukwu)**

7 Count Four charges defendant Ukwu with unlawful possession, use,  
8 and transfer of a means of identification, in violation of 18 U.S.C.  
9 § 1028(a)(7). The elements are as follows: (1) defendant knowingly  
10 transferred, possessed, or used a means of identification of another  
11 person; (2) defendant did so without lawful authority; (3) defendant  
12 transferred, possessed, or used the means of identification in  
13 connection with conspiracy to commit wire fraud, as charged in Count  
14 One; and (4) the transfer, possession, or use of the means of  
15 identification of another person was in or affected commerce between  
16 one state and other state, or between a state of the United States  
17 and a foreign country.

18 **D. Count Eight - Aggravated Identity Theft (Defendant Ukwu)**

19 Count Eight charges defendant Ukwu with aggravated identity  
20 theft, in violation of 18 U.S.C. § 1028A(a)(1). The elements are as  
21 follows: (1) defendant knowingly possessed without legal authority a  
22 means of identification of another person; (2) defendant knew that  
23 the means of identification belonged to a real person; and (3)  
24 defendant did so during and in relation to the offense charged in  
25 Count Four of the indictment, namely, the transfer, possession, or  
26 use of another's means of identification.  
27  
28

1 **IV. LEGAL AND EVIDENTIARY ISSUES**

2 **A. Hearsay**

3 Federal Rule of Evidence 801 defines "hearsay" as "a statement,  
4 other than one made by the declarant while testifying at the trial or  
5 hearing, offered in evidence to prove the truth of the matter  
6 asserted." Fed. R. Evid. 801(c).

7 1. Defendants' Statements

8 The government intends to admit statements made by defendants,  
9 including e-mail communications between themselves and others.  
10 Statements by a party opponent when offered against that party are  
11 excluded from the hearsay definition. Fed. R. Evid. 801(d)(2)(A).  
12 Thus, defendants' statements may be admitted against the defendant  
13 who made the statements. Where these statements are not in  
14 furtherance of the charged scheme, the government asks that the Court  
15 give a limiting instruction so that the jury understands that it is  
16 not to consider the statement as evidence against the other  
17 defendants.

18 When the government offers some of a defendant's prior  
19 statements, the door is not thereby opened to the defendant to  
20 introduce all of his or her out-of-court statements because, when  
21 offered by the defendant, the statements are hearsay. See Fed. R.  
22 Evid. 801(d)(2). Accordingly, exculpatory statements made by a  
23 defendant are hearsay and are not admissible at trial, when offered  
24 by the defendant. See Fed. R. Evid. 801(d), 802; United States v.  
25 Ortega, 203 F.3d 675, 682 (9th Cir. 2000).

26 2. Co-Conspirator Statements

27 The government may also admit statements made by co-schemers  
28 made in furtherance of the scheme, including e-mail communications

1 sent or received by defendants' co-schemers. A statement made by one  
2 co-conspirator or co-schemer during the course and in furtherance of  
3 the conspiracy or scheme may be used against another conspirator or  
4 co-schemer because such statements are not hearsay. Fed. R. Evid.  
5 801(d)(2)(E); Bourjaily v. United States, 483 U.S. 171, 183 (1987).  
6 A statement admitted under Rule 801(d)(2)(E) does not violate the  
7 Confrontation Clause, and no independent inquiry into reliability is  
8 needed. Bourjaily, 483 U.S. at 183-84; United States v. Knigge, 832  
9 F.2d 1100, 1107 (9th Cir. 1987), amended, 846 F.2d 591 (9th Cir.  
10 1988). Rule 801(d)(2)(E) requires a foundation that: (1) the  
11 declaration was made during the life of the conspiracy; (2) the  
12 declaration was made in furtherance of the conspiracy; and (3) there  
13 is sufficient proof of the existence of the conspiracy and  
14 defendant's connection to it. Bourjaily, 483 U.S. at 173, 181;  
15 United States v. Smith, 893 F.2d 1573, 1578 (9th Cir. 1990). These  
16 foundational requirements must be established by a preponderance of  
17 the evidence. Bourjaily, 483 U.S. at 175; United States v. Schmit,  
18 881 F.2d 608, 610 (9th Cir. 1989). To be admissible under Rule  
19 801(d)(2)(E), the statement must "further the common objectives of  
20 the conspiracy," or "set in motion transactions that [are] an  
21 integral part of the [conspiracy]." United States v. Aramula-Ruiz,  
22 987 F.2d 599, 607-08 (9th Cir. 1993); United States v. Yarborough,  
23 852 F.2d 1522, 1535 (9th Cir. 1988).

#### 24 **B. Authentication and Foundation**

25 Federal Rule of Evidence 901 (a) provides that "[t]he  
26 requirement of authentication or identification as a condition  
27 precedent to admissibility is satisfied by evidence sufficient to  
28 support a finding that the matter in question is what its proponent

1 claims." Under Rule 901(a), evidence should be admitted, despite any  
2 challenge, once the government makes a *prima facie* showing of  
3 authenticity or identification so "that a reasonable juror could find  
4 in favor of authenticity or identification . . . [because] the  
5 probative force of the evidence offered is, ultimately, an issue for  
6 the jury." United States v. Chu Kong Yin, 925 F.2d 990, 996 (9th  
7 Cir. 1991) (citations and internal quotation marks omitted); see also  
8 United States v. Black, 767 F.2d 1334, 1342 (9th Cir. 1985). The  
9 government need not establish all links in the chain of custody of an  
10 item or call all persons who were in a position to come into contact  
11 with it. See Gallego v. United States, 276 F.2d 914, 917 (9th Cir.  
12 1960). Alleged gaps in the chain of custody go to the weight of the  
13 evidence rather than to its admissibility. See United States v.  
14 Taylor, 716 F.2d 701, 711 (9th Cir. 1983). A duplicate is admissible  
15 to the same extent as the original, unless there is a genuine  
16 question as to the authenticity of the original or it would be unfair  
17 under the circumstances to admit the duplicate in lieu of the  
18 original. See Fed. R. Evid. 1003; Smith, 893 F.2d at 1579.

19 Here, as discussed during the pretrial conference, the  
20 government may move to introduce select e-mail communications sent by  
21 co-defendant Bell and others related to the scheme. Although the  
22 government does not anticipate any authenticity objections from the  
23 defense (given that they too plan on admitted select e-mails from Mr.  
24 Bell's account), the government nonetheless raises the issue here.  
25 If necessary, the government's previous case agent, FBI Special Agent  
26 Ryan Heaton, can testify and lay the appropriate foundation for such  
27 communications.

1           **C.     Character Evidence**

2           The Supreme Court has recognized that character evidence -  
3 particularly cumulative character evidence - has weak probative value  
4 and great potential to confuse the issues and prejudice the jury.  
5 See Michelson v. United States, 335 U.S. 469, 480, 486 (1948). The  
6 Court has thus given trial courts wide discretion to limit the  
7 presentation of character evidence. Id.

8           In addition, the form of the proffered evidence must be proper.  
9 Federal Rule of Evidence 405(a) sets forth the sole methods for which  
10 character evidence may be introduced. It specifically states that,  
11 where evidence of a character trait is admissible, proof may be made  
12 in two ways: (1) by testimony as to reputation and (2) by testimony  
13 as to opinion. Thus, a defendant may not introduce specific  
14 instances of his or her good conduct through the testimony of others.  
15 See Michelson, 335 U.S. at 477. On cross-examination of a  
16 defendant's character witness, however, the government may inquire  
17 into specific instances of a defendant's past conduct relevant to the  
18 character trait at issue. See Fed. R. Evid. 405(a). In particular,  
19 a defendant's character witnesses may be cross-examined about their  
20 knowledge of the defendant's past crimes, wrongful acts, and arrests.  
21 See Michelson, 335 U.S. at 481. The only prerequisite is that there  
22 must be a good faith basis that the incidents inquired about are  
23 relevant to the character trait at issue. See United States v.  
24 McCollom, 664 F.2d 56, 58 (5th Cir. 1981).

25           At the pretrial conference, counsel for defendant Ferguson  
26 alluded to possibly eliciting from defendant Ferguson, or another  
27 trial witness, that Ms. Ferguson does not have a prior criminal  
28 history. Such testimony should be excluded as improper character

1 evidence, i.e., because she did not break the law previously, she  
2 therefore did not break the law now. See United States v. Reese, 666  
3 F.3d 1007, 1020 (7th Cir. 2012) (“[T]hat a defendant acted lawfully  
4 on other occasions is generally inadmissible to prove he acted  
5 lawfully on the occasion[s] alleged in the indictment.”); see also  
6 United States v. Scarpa, 897 F.2d 63, 70 (2d Cir. 1990) (“A defendant  
7 may not seek to establish his innocence . . . through proof of the  
8 absence of criminal acts on specific occasions.”); United States v.  
9 Kreimer, 609 F.2d 126, 130 (5th Cir. 1980) (“The question is not how  
10 many times they obeyed the law but whether or not on the occasions  
11 charged they violated it.”).

#### 12 **D. Cross-Examination of Defendants**

13 A defendant who testifies at trial may be cross-examined as to  
14 all matters reasonably related to the issues he or she puts in  
15 dispute during direct examination. “A defendant has no right to  
16 avoid cross-examination on matters which call into question his claim  
17 of innocence.” United States v. Miranda-Uriarte, 649 F.2d 1345,  
18 1353-54 (9th Cir. 1981).

19 Defendants’ credibility will be crucial if they choose to  
20 testify in order to refute the government’s showing of knowledge and  
21 intent. Indeed, because defendants are the only witnesses with  
22 “direct” evidence of their own knowledge and intent, if they take the  
23 stand to deny any knowledge of the fraud, their credibility becomes a  
24 key issue. Accordingly, cross-examination of defendants about other  
25 fraudulent conduct in which they have engaged is necessary for the  
26 jury to weigh whether defendant’s denial of knowledge and intent is  
27 credible given his other actions. As the Ninth Circuit has held,  
28 Rule 608(b):

1 specifically contemplates inquiries into prior behavior in  
2 order to challenge a witness's credibility. Evidence of  
3 prior frauds is considered probative of the witness's  
4 character for truthfulness or untruthfulness.

5 United States v. Gay, 967 F.2d 322, 328 (9th Cir. 1992).

6 The prejudicial effect of such evidence, if any, can be  
7 addressed by a limiting instruction. The admission of evidence  
8 harmful to the defendant's case does not necessarily constitute  
9 unfair prejudice. United States v. Fagan, 996 F.2d 1009, 1015 (9th  
10 Cir. 1993). Unfair prejudice results from evidence that "provokes an  
11 emotional response in the jury or otherwise tends to affect adversely  
12 the jury's attitude toward the defendant wholly apart from its  
13 judgment as to his guilt or innocence of the crime charged." Id.  
(internal quotation marks omitted).

14 Finally, the government is not required to provide notice of  
15 matters about which it may seek to cross-examine defense witnesses,  
16 including defendants, should they testify.

#### 17 **E. Jury Nullification**

18 As this Court has already held, defendant is not entitled to  
19 make any arguments to suggest jury nullification. This includes any  
20 evidence or argument about the government's charging decisions as to  
21 other fraudulent travelers, or unduly prejudicial evidence regarding  
22 co-defendant Bell, i.e., his unrelated firearms trafficking  
23 conviction.

24 It is well-established that a defendant does not have a right to  
25 a jury nullification instruction. United States v. Powell, 955 F.2d  
26 1206, 1213 (9th Cir. 1992). Having no right to seek jury  
27 nullification, defendant has no right to present evidence relevant  
28 only to such a defense. Zal v. Steppe, 968 F.2d 924, 930 (9th Cir.

1 1992) (Trott, J., concurring) ("[N]either a defendant nor his  
2 attorney has a right to present to a jury evidence that is irrelevant  
3 to a legal defense to, or an element of, the crime charged. Verdicts  
4 must be based on the law and the evidence, not on jury nullification  
5 as urged by either litigant."). And, in any event, under Federal  
6 Rules of Evidence 401 and 403, such arguments or evidence are not  
7 relevant to any valid defense to the offense charged and will  
8 unnecessarily confuse the issues and mislead the jury. Accordingly,  
9 such arguments and evidence are improper and warrant exclusion.

10 **V. CONCLUSION**

11 The government respectfully requests leave to supplement this  
12 Trial Memorandum, as necessary.

13  
14 Dated: March 21, 2023

Respectfully submitted,

15 E. MARTIN ESTRADA  
16 United States Attorney

17 MACK E. JENKINS  
18 Assistant United States Attorney  
Chief, Criminal Division

19 /s/  
20 KEVIN J. BUTLER  
21 ALI MOGHADDAS  
Assistant United States Attorneys

22 Attorneys for Plaintiff  
23 UNITED STATES OF AMERICA  
24  
25  
26  
27  
28